

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

J Joseph McKittrick dba McKittrick Law Offices

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43 V unpaid vacation pay
RSA 275:43 V unpaid sick pay

Employer: J Joseph McKittrick dba McKittrick Law Offices, 188 Lafayette Rd, N
Hampton NH 03862

Date of Hearing: February 4, 2016

Case No.: 51962

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts she is owed \$560 in unpaid sick pay and vacation pay. She argues she is due one day of sick pay which she used on October 13, 2015, when her daughter was ill, and three days of vacation pay she used between November 4 and 6, 2015.

The employer denies the claimant is due any sick pay because she was absent due to her child's illness, not her own, and she was not eligible for vacation pay until after her ninety day review.

FINDINGS OF FACT

The claimant worked for the employer from August 31, 2015 through November 20, 2015, when she resigned. During all relevant times, she received \$17.50 as an hourly wage.

The claimant argues she is due one day of sick pay (eight hours * \$17.50, or \$140) for October 13, 2015.

The employer argues that though she had sick time available to use for her own sickness, it was for her own sickness, and on October 13, 2015, the claimant's daughter was ill.

RSA 275:49 III requires that the employer make available to employees in writing, or through a posted notice maintained in an accessible place, employment practices and policies regarding sick leave pay. Lab 803.03 (b) requires employers to provide his/her employees with a written or posted detailed description of employment practices and policies as they pertain to paid vacations, holidays, sick leave, bonuses, severance pay, personal days, payment of the employees expenses, pension and all other fringe benefits per RSA 275: 49. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The employer properly noticed the claimant that she would receive "four sick days per year (non-accumulative) as needed."

Employers are not required to offer sick pay benefits to their employees. However, if a sick pay benefit is offered, RSA 275:49 requires an employer to put their practices and policies regarding this benefit in writing, and maintain on file an employee signed copy of the notification.

The employer admits he provided the claimant four days of sick pay. He did not place any restrictions as to whether or not this day could be used for sickness for a dependent child or not. He could have done so, but chose not to.

Additionally, the employer paid the claimant for the sick day. He then retroactively deducted this payment from her next paycheck. The employer is precluded from making such deductions from a claimant's wages, pursuant to RSA 275:48.

The Hearing Officer finds the claimant proved by a preponderance of the evidence that employer illegally withheld \$140 from her wages for a previously paid sick day.

The claimant alleges she is due three days of vacation pay (eight hours *three days* \$17.50, or \$420) for November 4 through 6, 2015.

The employer argues the claimant told him she would not be working those days but she never requested to use vacation days. Further, he argues that though he gave the claimant a written notice stating that she had two weeks paid vacation at hire, and never verbally or otherwise notified her, she could not use this time until after a ninety day review.

He also argues she took a half day offer earlier in her employment and did not request to use vacation time at that time, so she must have known she could not use vacation time.

RSA 275:49 III requires that the employer make available to employees in writing, or through a posted notice maintained in an accessible place, employment practices and policies regarding vacation pay. Lab 803.03 (b) requires employers to provide his/her employees with a written or posted detailed description of employment practices and policies as they pertain to paid vacations, holidays, sick leave, bonuses,

severance pay, personal days, payment of the employees expenses, pension and all other fringe benefits per RSA 275: 49. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The employer properly noticed the claimant that she would receive “two weeks paid vacation;”.

Employers are not required to offer vacation pay benefits to their employees. However, if a vacation pay benefit is offered, RSA 275:49 requires an employer to put their practices and policies regarding this benefit in writing, and maintain on file an employee signed copy of the notification.

The employer admits he provided the claimant two weeks of paid vacation pay. He did not place any restrictions as to when this benefit could begin to be used. He could have done so, but chose not to. The plain English reading of this statement “two weeks paid vacation” is understood that the claimant has two weeks paid vacation available to use as of the effective date of the document, which was August 31, 2015 (though the employer mistakenly dated the letter August 6, 2014).

The employer’s argument that the claimant did not ask for vacation day for a half day she left the office, is not persuasive, or relevant, to this claim.

Therefore, the Hearing Officer finds the claimant proved by a preponderance of the evidence that she is due the claimed vacation pay.

DISCUSSION

The claimant has the burden of proof in these matters to provide proof by a preponderance of evidence that her assertions are true.

Pursuant to Lab 202.05 “Proof by a preponderance of evidence” means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not.

The Hearing Officer finds the claimant met her burden in this claim.

DECISION AND ORDER

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as RSA 275:43 V considers sick pay to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant proved by a preponderance of the evidence that she is due the claimed sick pay, and RSA 275:48 precludes the employer from making a deduction from the claimant’s wages, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$140.00.

As RSA 275:43 V considers vacation pay to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant proved by a preponderance of the evidence that she is due the claimed vacation pay, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$420.00.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED], in the total of \$560.00 (\$140 + \$420), less any applicable taxes, within 20 days of the date of this Order.

Melissa J. Delorey
Hearing Officer

Date of Decision: February 5, 2016

Original: Claimant
cc: Employer

MJD/aph